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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Nos. 357 and 358

CIRACO MANEJA, *et al.*, *Petitioners*,

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Respondent*.

WAIALUA AGRICULTURAL COMPANY, LIMITED, *Petitioner*,

v.

CIRACO MANEJA, *et al.*, *Respondents*.

BRIEF FOR WAIALUA AGRICULTURAL COMPANY, LIMITED IN ANSWER TO BRIEFS OF CIRACO MANEJA, ET AL. AND OF THE SECRETARY OF LABOR AS AMICUS CURIAE

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BRIEF FOR WAIALUA AGRICULTURAL COMPANY, LIMITED IN ANSWER TO BRIEFS OF CIRACO MANEJA, ET AL. AND OF THE SECRETARY OF LABOR AS AMICUS CURIAE

Waialua respectfully submits this brief in answer to both the Employees' Brief and the brief for the Secretary of Labor as *amicus curiae.*

I. THE EMPLOYEES WERE WITHIN THE AGRICULTURE EXEMPTION IN SECTION 13(a)(6) OF THE ACT

The positions of the parties, as well as that of the Secretary, on the scope of the agriculture exemption in the Act, as disclosed by their briefs, may be summarized as follows:

Waialua's position is that the agriculture exemption excludes from the Act all activities performed by the farmer or on the farm in connection with growing and marketing the farm's crops. As applied to Waialua, the exemption therefore excludes from the Act all activities in connection with the growing and the preparation for market of its sugar cane.

The Employees and Secretary argue, however, that the agriculture exemption should be confined to employees engaged in field activities and should be denied to employees engaged in such activities as railroad transportation, cane processing, and repair and maintenance work.[1]

The arguments of the Secretary and Employees, not treated in Waialua's original Brief, are dealt with below.

A. The Plain Language and Intent of the Agriculture Exemption Cannot Be Nullified by Purported Rules of Statutory Construction.

The Secretary asserts that the coverage of the Act should be construed "broadly" and exemptions "narrowly"—and when so construed, the agriculture exemption is inapplicable to such activities as main line railroad transportation, repair and maintenance work and cane processing. Secretary's Br., pp. 23-24, 25, 26, 32, 45-46. Waialua submits that general "rules of statutory construction" cannot nullify both statutory language and Congressional purpose. *Cf. Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783; *United States* v. *Hood*, 343 U.S. 148, 151.

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[1] The Secretary states in his Brief that he has never expressed an opinion on the coverage under the Act of village maintenance employees, nor does he do so now. Secretary's Br., p. 3. The Employees, however, ask that the village maintenance employees be held engaged in the production of goods for commerce and not within the agriculture exemption. Employees' Br., pp. 61-71. It should also be observed that, as noted by the Secretary, after Section 3(j) of the Act was amended in 1949, the Secretary expressed the opinion that such village maintenance employees would not be covered. Secretary's Br., p. 3, note 1.

The unsoundness of the Secretary's position is clearly revealed by making comparison of the "coverage" language of the Act with the language found in the agriculture exemption. The Act's coverage with respect to the activities here in issue is fixed by Section 3(j) which defined the word "produced" as meaning

> ". . . produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in *any process or occupation necessary to the production* thereof, in any State" [Emphasis supplied].

On the other hand the agriculture exemption is defined in Section 3(f) as including

> "farming in all its branches . . . cultivation and tillage of the soil . . . the production, cultivation, growing, and harvesting of any agricultural . . . commodities . . . and *any practices* (including any forestry or lumbering operations) performed by a farmer or on a farm as an *incident to or in conjunction with such farming operations*, including preparation for market, delivery to storage or to market or to carriers for transportation to market" [Emphasis supplied].

The Ninth Circuit concluded that none of the activities here involved comes within the commerce coverage of the Act (R. 740, 742-743). Waialua believes (Br., p. 31) that all but mill village workers are covered under Section 3(j), but that all employees involved are exempt under Section 3(f). If this Court is to hold covered the employees engaged in railroad transportation, repair and maintenance work, etc., it must place primary reliance upon the phrase in Section 3(j) reading "any process or occupation necessary to the production" of goods. *Kirschbaum* v. *Walling*, 316 U.S. 517, 524-526; *Armour* v. *Wantock*, 323 U.S. 126,

129-132; *Borden* v. *Borella*, 325 U.S. 679, 682-685; *Roland Electrical Company* v. *Walling*, 326 U.S. 657, 662-665. In other words, the work of these employees comes within the reach of the statute only if the Court concludes that such work is "necessary" to the growing and marketing of Waialua's sugar cane. But an activity is "agriculture" if it is simply "incident to or in conjunction with" the growing and marketing of Waialua's sugar cane. For example, the Secretary is asking this Court to hold that the employees of a farmer, who are engaged in railroad transportation on a farm, are so necessary to the production of cane as to fall within the coverage of the Act, but that such transportation is not an activity "incident to or in conjunction with" the production of the cane. Manifestly the test of being "necessary" to the production of sugar cane is a more rigid test and one more difficult to meet than the test of being "incident to or in conjunction with" such production, where, as here, the practices are engaged in by a farmer on his farm. The Secretary's argument is therefore untenable.[2]

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[2] Our argument is plainly distinguishable from the argument rejected in the *Farmers Irrigation Company* case (337 U.S. 755), that the irrigation operation there performed by the cooperative irrigation company constituted the "production . . . of . . . agricultural . . . commodities" within the meaning of Section 3(f), because "produced" is defined in 3(j) as including "any . . . occupation necessary" to production. This Court pointed out that the irrigation company's employees were not "in any normal use of the term" engaged in the production of agricultural commodities. 337 U.S. at 766. It held that the word "production" was not used in Section 3(f) in the special sense in which it was defined in Section 3(j), for if it were used in that sense it would make surplusage of the remainder of the "carefully wrought definition" in Section 3(f). *Id.*, pp. 764, 766. Moreover, the Court said that the legislative history of the use of the word "production" in Section 3(f) shows that it was added to take care of the "production of turpentine and gum rosins"—an activity which would not be reached by simply the words "cultivation" or "growing". *Id.*, p. 765. Our argument here is not based

In this Act, unlike the National Labor Relations Act, Congress was not satisfied with merely including an undefined exemption for agricultural labor, but carefully provided a detailed definition of "agriculture". As stated in *Damutz* v. *Pinchbeck*, 158 F. (2d) 882, 883 (C.C.A. 2) . . .

> "this exemption provision . . . is drawn in far-reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Differing definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one".[3]

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upon seeking to apply the definition of "produced" in Section 3(j) to Section 3(f). We argue simply that if the activities here involved are "necessary" to the production of sugarcane within the meaning of Section 3(j), *a fortiori*, they are "incident to or in conjunction with" the production of the cane and hence come within the second and broader branch of the definition of agriculture. Waialua's Br., pp. 36, 55-57. This issue was not presented in the *Farmers Irrigation Company* case, since the cooperative there involved did not meet the overriding requirement of the second branch that the practices be "performed by a farmer or on a farm." *Id.*, pp. 766-767. The issue is squarely presented here, where the practices in issue were performed by a farmer *and* on a farm. Waialua's Brief, pp. 37-40.

[3] *Waialua Agricultural Co.* v. *United Sugar Workers, ILWU Local 142 et al.*, 114 F. Supp. 243 (D. Hawaii 1953), relied upon by the Employees (Br., p. 46), is therefore inapposite. That was a suit for breach of a collective bargaining contract brought under Title III of the Labor Management Relations Act, 1947. The court there made it abundantly clear that it was construing simply the term "agricultural laborer" as used in that Act and that it did not regard the definition of "agriculture" contained in the Fair Labor Standards Act as having any bearing upon the issue before it, because that was "a different statute which supplied a Congressional definition of the term 'agriculture', 29 U.S.C.A. § 203(f), a definition not included in the Labor-Management Relations Act". *Id.*, p. 247.

Moreover, the unsoundness of the Secretary's position is further shown by an examination of the Congressional purpose behind the agriculture exemption. The exclusion of all agriculture from the Act was predicated upon a Congressional policy which must be effectuated in the agricultural area to no lesser extent than the Congressional policy concerning the covered industrial area. Congress was as anxious to exempt the farmer in all his activities as it was to cover the industrial workers. Waialua's Brief, pp. 45-55. The agriculture exemption is "probably the most far-reaching" in the Act. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 612. It is a reasonable conclusion from the legislative history that the Fair Labor Standards Act would never have been enacted without this far-reaching exemption. Waialua's Br., pp. 51-52. Congress' repeated refusal since the passage of the law to narrow the agriculture exemption, under proposals referred to in the Employees' Brief (p. 86, note 52), underscores the statutory policy in this respect.[4]

Accordingly, the Court of Appeals below correctly pointed out in *McComb* v. *Hunt Foods*, 167 F. (2d) 905, 908, that while the Act in its general purpose is remedial in character, it is equally remedial in its specific purpose of according broad agricultural exemptions. As stated in this Court's recent unanimous opinion giving effect to a statutory limitation under the Walsh-Healey Act in a suit brought by the United States:

> "It is not for us then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But

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[4] In 1949, a few months after the decision of this Court in the *Farmers Irrigation Co.* case, *infra*, pp. 7-9, Congress amended the Act to extend the agriculture exemption to the cooperative irrigation operation held nonexempt in that case (Section 13(a) (6) of Act as amended by Fair Labor Standards Amendments of 1949, 63 Stat. 910, 918).

> when Congress . . . has used language which plainly brings a subject matter into a statute, its word is final —save for questions of constitutional power . . .". *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59, 64.

B. The Employees and Secretary Not Only Reject the Plain Statutory Language But Also Completely Ignore the Legislative History of the Exemption.

The Employees and the Secretary urge that the language of the agriculture exemption should not be given its ordinary meaning. But at the same time they construe the exemption without reference to its legislative history. This is underscored by the remarkable fact that their briefs completely ignore the legislative history of the exemption, which history is exhaustively presented in Waialua's Brief, pp. 45-52, 90-96. On every decisive point the legislative history re-enforces Waialua's position and repudiates that of the Employees and the Secretary. *Cf. United States* v. *Universal C.I.T. Corp.,* 344 U.S. 218, 222-224. In particular, it stresses the policy underlying the agriculture exemption and clearly reveals why Congress phrased the exemption in comprehensive language.

C. The Employees and Secretary Reject the Fundamental Analysis of the Agriculture Exemption Made By This Court in the Farmers Irrigation Company Case.

1. The Employees contend that when Waialua, for reasons of efficiency, organized itself into separate departments, it created and became thereby engaged in several separate and distinct enterprises, in addition to farming, including "transportation", "manufacturing", "repair and maintenance", etc., none of which allegedly could properly claim the exemption. Employees' Br., pp. 33-40. For authority they quote a portion of this Court's decision in the *Farmers Irrigation Company* case (Employees' Br., pp. 37-39), to the effect that where activities are separately organized as independent productive activities (which the

Employees assert is the case here), the exemption does not apply. 337 U.S. at 761. The Secretary makes substantially the same contention (Secretary's Br., pp. 23-27).

A reading of the full opinion of the Court in the *Farmers Irrigation Company* case, however, makes it manifest that the Employees and Secretary have misconstrued the meaning of the quotation from the opinion. This Court did not say that activities of a single farmer, which were otherwise exempt, would lose their exemption when organized by the farmer into separate departments, as in the case of Waialua. What this Court said was that many activities, such as manufacturing fertilizer, producing power, and making tools, would not be exempt when organized into separate business entities. 337 U.S. at 768; see Waialua's Br., p. 57.

2. The Secretary contends, however, that the Court regarded the independent incorporation of the irrigation company in the *Farmers Irrigation Company* case as significant only because the irrigation function is so closely connected with planting, growing and harvesting crops that the independent incorporation of the employer was about the only evidence of its separateness, and hence the only basis upon which the exemption could have been disallowed. But in the case at bar, the Secretary contends the activities here in issue are less closely connected with planting, growing and harvesting than irrigating and are separately organized as independent productive functions even though conducted by the same employer, Waialua, and therefore should be held nonexempt. Secretary's Br., pp. 25-26. The Secretary's argument, however, fails to recognize that the statutory definition itself required this Court's decision in the *Farmers Irrigation Company* case to turn upon the question of who performed the irrigation function—the farmer himself or a separate corporate entity. As this Court said,

> "If the Act exempted all such practices [i.e. practices incident to or in conjunction with farming], the com-

pany would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm". (337 U.S. at 766)

And further this Court said:

> "*The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system.* The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere. Those employed in that activity are employed by the company, not by the farmers who own the company." [Emphasis supplied]. 337 U.S. at 768.

The fact of independent operation, which this Court's opinion expressly said was "controlling", is rejected in the Secretary's brief.

Furthermore, a major part of the Record refutes the Secretary's assertion that crop irrigation is more closely connected with the production and harvesting of the sugar cane than are cane hauling and cane processing. All the activities of the employees here in issue are an integral part of Waialua's growing of sugar cane and preparing it for market. By no test can spreading water on the cane fields be deemed more closely connected with the production of sugar cane than the hauling of the freshly cut perishable cane from the fields and preparing it for market.

D. The Employees and Secretary Would Deprive Much of the Language in the Agriculture Definition of its Ordinary and Intended Meaning.

1. *"Practices . . . performed by a farmer"*

The Secretary asserts that the *employees* involved here are not "farmers" (Secretary's Br., pp. 26, 33) and hence are not exempt. The term "farmer" appears only in the definition of "agriculture" contained in Section 3(f) and

as there used it is plain that it refers to an employer, and not employees, engaged in conducting the activities listed in the first branch of the definition. See Waialua's Brief, p. 37.

Although the Secretary does not define the term "farmer", it would seem that he means by the term one who works with the soil in the fields (Secretary's Br., pp. 23, 26, 33-34, 36, 37, 38, 39). But an examination of the Act shows that it exempts all employees "employed in agriculture" as the term "agriculture" is defined in Section 3(f), rather than "farmers". And if an employee is "employed in agriculture" as that term is so defined in the Act, he is exempt regardless of whether in common parlance he may be characterized a "farmer". *Cf. Damutz* v. *Pinchbeck*, 158 F. (2d) 882, 883 (C.C.A. 2), *supra*, p. 5. The Secretary's argument amounts to a rejection of the exemption as Congress wrote it and the substitution instead of an exemption, created by the Secretary, for an undefined class of employees, which he styles "farmers".

2. *The exemption is not limited to field activities*

The entire argument of both the Employees and Secretary on the agriculture exemption (Employees' Br., pp. 29-47; Secretary's Br., pp. 22-47) is based upon the unrealistic conception that "agriculture" embraces only activities performed in the *fields* where crops are grown and that "farm hands" or "farm employees" include only those employees working with the soil (Employees' Br., pp. 20, 33-34, 36, 39-42, 45; Secretary's Br., pp. 23, 26, 33-34, 36, 37, 38, 39). Moreover both briefs assume that the exemption does not apply because, allegedly,

> ". . . what the company fails to recognize is that . . . Waialua has elaborate industrial and railroad facilities (R. 721-723) not to be found on the ordinary farm. Some farmers may engage in processing or transportation activities through employees who normally work at tilling the soil, but Waialua performs these functions through a separate organization (R. 633-4, 643)

and employs a large number of specially skilled craftsmen who do no farming at all (R. 790, 802) The differences between the two situations are so great as clearly to require different treatment." Secretary's Br., p. 39; see also Employees' Br., p. 41.

These contentions run counter to the facts of American agricultural life in the twentieth century. In order to achieve lower per unit costs, agricultural activities are being mechanized at an accelerated pace. The average size of farms has been increasing since the turn of the century. Business and scientific methods have long since been introduced. Waialua's Br., pp. 52-54. To obtain greater efficiency, larger-type farms have departmentalized their operations, and have developed specialization in their work forces.[5] Contrary to the position of the Employees and the Secretary, none of these factors detracts from the application of the exemption in the Act, which depends wholly upon whether the activities in question fall within the comprehensive terms of the exemption as carefully defined in Section 3(f).

3. *Waialua is engaged in but one enterprise*

The Secretary asserts that Waialua is engaged in several different enterprises, "separate" and "distinct", only one of which is "farming". Secretary's Br., pp. 25, 26, 27, 37, 38, 39, 40 and 41. It is difficult to see how the Secretary can assert this seriously in view of the Record. As the undisputed facts show (R. 31 *et seq.*), Waialua is a

[5] "The changes that have taken place and are coming make farming a complex business, even on family-operated farms. Young men who look forward to farming as an occupation will need to learn the skills associated with mechanized farming and how to conduct a complex business enterprise. Those who are well adapted for managing a business of this kind are likely to find opportunities in agriculture as good as in any other occupation." See *Science in Farming, Yearbook of Agriculture 1943-1947*, p. 931.

single company, with a single management, engaged on a single plantation containing a single tract of land, and producing a single agricultural commodity.

All the activities of the employees here involved were integrated and coordinated with and an indispensable part of Waialua's operations of producing, cultivating, growing and harvesting sugar cane (R. 33, 35-36, 52, 67, 76, 94) and the District Court (R. 754-755) and the Court of Appeals below (R. 733-734) so found.

The hauling, processing and repair activities of the Employees were no more "separate" and "distinct" from the field activities than "planting" (R. 40-42) was from "cultivation" (R. 42-44) or "irrigation" (R. 45-52) was from "harvesting" (R. 52-59). See also R. 178. It is true that to achieve greater efficiency, the hauling, processing and repair activities were departmentalized in that in general they were performed by different employees than those who performed the field activities and such employees were carried on the payroll and accounting records of Waialua as attached to different departments than the field employees. Waialua's Br., p. 44. But, as above pointed out, such departmentalization does not detract from the application of the exemption in the Act. The question of whether particular employees come within the exemption depends only upon whether they perform activities falling within the exemption as defined in Section 3(f).

And if the Secretary means to say that the activities here in issue are "separate" and "distinct" because geographically they are performed away from the fields, such contention also will not stand up under analysis. The agriculture definition includes, *inter alia*, "harvesting", "preparation for market", "delivery to storage", "delivery . . . to market", and "delivery . . . to carriers for transportation to market", as well as "production, cultivation, growing . . . of . . . agricultural . . . commodities." Patently, many of these activities, such as "preparation for market", "delivery to storage",

"delivery . . . to market" and "delivery . . . to carriers for transportation to market", must take place in geographical areas different from those where "cultivation", "growing", and "harvesting" occur.

4. *"Practices . . . Incident To Or In Conjunction With . . . Farming Operations"*

The Secretary asserts that the agriculture exemption does not apply here because the term "practices", as used in Section 3(f), suggests only activities "ordinarily" or "normally" carried on by farmers with their "ordinary" farming activities. Secretary's Br., pp. 37-38. But this argument cannot be reconciled with the fact that the statutory language itself, in giving examples of exempt "practices", lists "preparation for market, delivery to storage or to market or to carriers for transportation to market"—the very practices in issue here. That is, Congress specifically exempted the activities involved here, namely transportation and preparation for market, when performed by the farmer.

Furthermore the Secretary's argument ignores the fact that at one time in its legislative history, the agriculture exemption was limited to practices "ordinarily" performed by a farmer or on a farm as an incident to farming operations, and that this limitation was expressly stricken from the bill before enactment. Waialua's Br., p. 50. In any event, cane hauling and cane grinding are "ordinarily" performed by Waialua on the cane that it grows, following the usual practice in Hawaii. Waialua's Br., p. 43, note 25; *Bulletin No. 926, United States Department of Labor, "The Economy of Hawaii in 1947"*, p. 45.

5. *"Practices . . . Performed . . . On a Farm"*

The Secretary contends that the Employees do not work "on a farm" because they work in areas "set apart for industrial, railroad, and comparable nonfarming activity" and the "fields on which the sugarcane is grown are

distinct from the areas allotted to the processing plant, the main railroad line, and the repair and maintenance shops." Secretary's Br., p. 36. But the term "farm" has never been confined to those portions of a farm upon which agricultural products actually grow. Thousands of farms have barns, field roads and many other buildings and improvements, on the sites of which agricultural products do not grow. The term "farm" has never been deemed to exclude the location of such barns, field roads and other buildings and improvements. Waialua's Br., pp. 39-40. As the Secretary would construe the term "farm," once employees come out of the growing fields they would no longer be working "on a farm." Thus even if a sugar cane grower used oxen to haul his sugar cane from fields to the mill, once the employees started the oxen out of the fields, they would no longer be working "on a farm". The absurdity of this position carries its own refutation.

Moreover, even if the employees here involved do not work "on a farm", they are still exempt because employed "by a farmer". The Department of Labor has itself recognized in its Interpretative Bulletin No. 14, ¶ 10, that incidental and conjunctive practices, if performed by a farmer, are exempt and in that situation "it makes no difference whether they are performed on or off the farm" (Quoted in Waialua's Br., p. 97; see also pp. 99-100).

6. *Carpenters, electricians, plumbers, etc., can perform "practices . . . incident to or in conjunction with . . . farming operations"*

The Employees and the Secretary also wrongly assume that the exemption does not apply to certain employees because the Record shows that they were working as carpenters, plumbers, welders, electricians, locomotive engineers and repairmen, etc. Employees' Br., pp. 29, 35, 45; Secretary's Br., pp. 23, 33. The exempt or nonexempt status of these employees, however, cannot be determined by viewing their activities in isolation, but only in the light

of the relationship of their work to Waialua's overall activities of growing and processing cane. Viewed in this light, it is clear that whatever words are used to describe the activities of these employees, they perform work falling within the agriculture definition and hence are exempt. Waialua's Br., pp. 40-45.

The Secretary asserts that "the critical significance of the occupations of the *employees*", in determining the applicability of the exemption, is evident from the wording of the exemption, which shows that whether an employee is exempt depends upon whether he is individually employed in "agriculture" and not upon his employer's general business. Secretary's Br., pp. 34-36. Waialua agrees that the agriculture exemption is an individual employee exemption. That proposition standing alone, however, is meaningless. It is necessary to examine the definition of "agriculture" contained in Section 3(f) and if an individual employee performs activities falling within that definition, he is exempt. This is perfectly consistent with the fact that the exemption is an individual employee exemption.

7. *The chain store analogy is not apt*

The chain store analogy offered by the Employees and the Secretary under the retail establishment exemption in the Act (Employees' Br., p. 37; Secretary's Br., p. 27) is not apt because of the wide difference in language of the exemption provisions in Section 13(a)(2) and Section 13(a)(6). The latter, by statutory definition, is much broader. While the Act specifically exempts "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations", it does not exempt any practice incident to or in conjunction with the *retail* activity. Furthermore, the facts in the two situations are wholly dissimilar. In the chain store case, *Phillips* v. *Walling*, 324 U.S. 490, the employees involved were found to serve predominantly the

economic function of nonexempt wholesaling rather than exempt retailing. The employees here involved, on the other hand, are exclusively employed by a farmer on his farm, and are engaged in activities falling under either the first or second branch of the agriculture definition in Section 3(f). None of the activities of Waialua's employees here involved is nonexempt.

E. Employees Engaged in Connection With Hauling Cane From the Fields to the Mill Plainly Come Within the Agriculture Exemption.

1. The Employees and Secretary argue that the agriculture exemption does not apply to the hauling of cane from the fields to the mill by rail. But both are silent as to the hauling by truck of materials, supplies, equipment and field workers to and from the fields on the plantation (R. 64-66, 235-239, 248-256, 279-283). Yet the District Court also denied exemption to several employees engaged in the latter type of hauling (R. 235-239, 248-256, 279-283), which is as large and important as the railroad hauling, since Waialua operates and maintains 97 trucks and cars to carry on its activities (R. 99). Obviously, the reason for the disparate treatment of the two types of hauling, which is found in the Employees' and Secretary's Briefs, is that hauling by truck on farms is commonplace, while hauling by rail is unusual.

Both Briefs refer to the railroad transportation and facilities as "elaborate" (Employees' Br., p. 41; Secretary's Br., p. 39), notwithstanding that the railroad is a narrow gauge railroad (R. 59), and not a modern railroad facility. This narrow gauge railroad was constructed and operated to fit the special needs of an integrated sugar plantation. The cane cars were only 10 or 11 feet by 6 feet by 5 feet (R. 61) and carloads averaged only 4¾ tons per car gross cane (R. 58). This is to be contrasted with normal sized freight cars which measure 40 feet by 10 feet by 9 feet and if fully loaded would carry an average of 50 tons of cane. See *1946 Car Builders' Cyclopedia of*

American Practice, 17th ed., edited by Roy V. Wright for the Association of American Railroads, pp. 122-123. Furthermore, while the Record shows (R. 59, 205-206) that during the period involved in the suit Waialua used a narrow gauge railroad in cane hauling, it no longer does so. Late in 1952, because it found the railroad costly and inefficient to operate, it substituted trucks to haul all cane from the fields to the mill and completely discontinued the use of the railroad.[6]

The sugar plantations in Hawaii use five different methods of hauling their cane from the fields to the mill: (a) railroads; (b) flumes; (c) tractors; (d) cableways; and (e) trucks. *Bulletin No. 926, U.S. Department of Labor, "The Economy of Hawaii in 1947"*, p. 45. Each plantation uses that method best suited to its needs. The application of the agriculture exemption, as the Court below found (R. 834), does not depend upon such irrelevant consideration as the medium of transportation used. Each year Waialua is required to transport hundreds of thousands of tons of sugar cane from its growing fields to its mill. Waialua should be allowed to use whatever medium of transportation is most efficient, without jeopardizing its exemption.

2. The Secretary asserts, without justification (Secretary's Br., pp. 31-32), that the employees engaged in cane hauling are not engaged in "harvesting" an agricultural commodity within the meaning of the first branch of the "agriculture" definition. The Secretary further errs in saying that Waialua does not undertake "seriously to

[6] See *Waialua Agricultural Co. v. United Sugar Workers, ILWU Local 142 et al.*, 114 F. Supp. 243, 247 (D. Hawaii 1953) and particularly the record in that case, Civil No. 1332, which show that Waialua is now hauling its cane from the fields to the mill by trucks. Moreover, the trend among all Hawaiian plantations is to substitute trucks for railroads in hauling cane. See *Bulletin No. 926, U. S. Department of Labor, "The Economy of Hawaii in 1947"*, p. 45.

support" the aspect of the Ninth Circuit's opinion to the effect that these employees were engaged in "harvesting". *Id.* The fact is that the Employees, while engaged in hauling cane from the fields to the mill, and whether on the portable tracks or on the permanent tracks, came within the term "harvesting" contained in the statutory definition. Waialua's Br., p. 42, note 23. The dictionary definition of the term "harvesting" is "to gather in a crop". *Id.* The Department of Labor's own bulletin No. 14 states in ¶ 5(a) that "harvesting" includes such hauling activities. Waialua's Br., p. 97.

3. The Secretary, in commenting on *Vives* v. *Serralles*, 145 F. (2d) 552 (Secretary's Br., pp. 29-31), discussed in Waialua's Brief, p. 59, is unmindful of the fact that the case, as shown in the opinion, involved two groups of transportation employees, both of which were held exempt under Section 13(a)(6). The second group worked on the farm where the mill was located and hauled the cane from the fields on the farm to the mill on the farm. The First Circuit referred in its opinion to the testimony of an employee in group two, a tractor operator, and said that employees in that group

> "'worked in the transportation of sugar cane', hauling cars to the central [the mill] where the plaintiffs would weigh them and then place them under the crane and . . . the crane operator [at the mill] would then 'lift up the bunch of cane and drop the cane on the conveyor'". 145 F. (2d) at 554.

Further referring to his testimony the Court said that "his testimony on behalf of the ox teamsters was to the same effect". *Id.*

Since the Court held the second group of employees exempt, as well as the first group, the Secretary errs in stating without qualification (Secretary's Br., p. 31) that in the *Vives* case the Court fixed the point at which the portable tracks met the permanent tracks as the dividing line between activities exempt under Section 13(a)(6), and

activities not so exempt. Insofar as the second group of employees was concerned, such point did not in the Court's opinion mark the end of the harvesting operation; instead, the harvesting operation continued up to the very point of the mill. The *Vives* case, therefore, clearly supports Waialua's contentions herein.[7]

4. The Secretary emphasizes (Secretary's Br., p. 31) as the main reason for the court's alleged holding in the *Vives* case the fact that the wages of laborers in the field performing operations up to the "concentration point" were regulated by the Secretary of Agriculture under the Sugar Act of 1937 (50 Stat. 903; 7 U.S.C. §§ 1100, *et seq.*). The need for a clear dividing line between the coverage of the two acts, the Secretary adds, suggested the concentration point as an appropriate point of cleavage.

The wage determinations of the Secretary of Agriculture under the Sugar Act are not relevant. Nor has the Department of Labor ever considered them relevant in interpreting the "agriculture" exemption in the Fair Labor Standards Act. Such Sugar Act wage determinations were made under a statute which authorizes wage determinations only for employees engaged in "production, cultivation, or harvesting". While the quoted words appear also in the definition of "agriculture" in the Fair Labor Standards Act, they form but a small part of such definition. See *Damutz* v. *Pinchbeck*, 158 F. (2d) 882, 883 (C.C.A. 2).

[7] The Secretary's Brief errs in another respect also with respect to the *Vives* case. It asserts (Secretary's Br., p. 30) that that case states that employees "engaged in the operation, repair, and maintenance of the company railroad", after "concentration", are not within the agriculture exemption. This statement is erroneous. The *Vives* case did not involve any employee engaged in the "repair and maintenance" of a railroad. What the Secretary has done is lift from context the Court's statement in the *Vives* case that the *Calaf* case (127 F. (2d) 934) involved "repair and maintenance" employees, as well as employees operating the employer's railroad.

In any event, with respect to Hawaii, the Secretary of Agriculture has construed the term "harvesting" in the Sugar Act as *including* main line hauling, because for years he has fixed the wages of employees engaged in such hauling under the Sugar Act. For example, in the wage determinations for 1941, 1942, 1943 and 1944, the Secretary of Agriculture (or the War Food Administrator) fixed wages for the following classes of employees, among others, in Hawaii: railroad brakemen, railroad engineers, railroad firemen and conductors. *Code of Federal Regulations*, Title 7, Ch. VIII, Pt. 802, § 802.34d (6 Fed. Reg. 611) (1941); § 802.34e (7 Fed. Reg. 3053) (1942); § 802.34f (8 Fed. Reg. 8780) (1943); § 802.34g (9 Fed. Reg. 869) (1944).[8] All these employees were engaged in main line transportation (R. 62-63, 205-206).

F. Other Erroneous Arguments By the Employees and Secretary Respecting Employees Engaged in Connection With Processing Cane.

1. The Employees cite *Bowie* v. *Gonzalez*, 117 F. (2d) 11 (C.C.A. 1) (Br., pp. 46-47) for the proposition that the agriculture exemption does not apply to the employees engaged in connection with sugar cane processing, because such employees are exempt under Section 7(c). (The Sec-

[8] Since 1945 the wage determinations for Hawaii of the Secretary of Agriculture have not specified the particular occupations to which the determinations applied. Each one has merely stated that the determination applied to employees engaged in "production, cultivation, or harvesting" of sugar cane, the activities specified in the Sugar Act as those for which the Secretary is to determine fair and reasonable wage rates (Section 301(b) of Sugar Act of 1937, 50 Stat. 909, 7 U.S.C., Sec. 1131; Section 301(c) (1) of Sugar Act of 1948, 61 Stat. 929, 7 U.S.C. Section 1131). Such determinations are published in the Federal Register as follows: 10 Fed. Reg. 2281 (1945); 11 Fed. Reg. 2149 (1946); 12 Fed. Reg. 3311 (1947); 13 Fed. Reg. 212 (1948); 14 Fed. Reg. 218 (1949); 15 Fed. Reg. 653 (1950); 16 Fed. Reg. 114 (1951); 17 Fed. Reg. 5322 (1952); 17 Fed. Reg. 11711 (1953); 19 Fed. Reg. 2977 (1954).

retary makes the same argument, but without reference to the *Bowie* case (Secretary's Br., p. 19)). The *Bowie* case involved an independent sugar cane processor, that is, a processor who processed not only the cane he grew himself but also cane grown by others. See *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 766, note 15. If such sugar cane processing by the independent processor was held to come within the agriculture exemption, the processing exemption in Section 7(c) would have served no purpose in the Act. That was all the Court said in the *Bowie* case. The *Bowie* case did not by any means hold or even imply that the agriculture exemption, which has a broader and entirely different purpose, does not exempt the processing done by a farmer of his own cane alone. *Cf. International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 244.

2. The Employees' Brief (p. 36) errs in comparing Waialua's processing operations to those of a hypothetical cotton farmer, who manufactures cotton cloth on his farm. Sugar cane has no market until it has been processed into raw sugar and it never moves into interstate commerce until so processed (R. 33). Thus it is not prepared "for market" until converted into raw sugar. Cotton on the other hand is prepared "for market" as soon as it is ginned and baled, because it is marketed by the farmer in that form and long before it has been converted into cloth or any other manufactured product. The processing of sugar cane into raw sugar represents the first and only process upon the sugar cane, such process being necessary to convert it into a non-perishable commodity suitably prepared "for market". The making of cloth from raw cotton, however, requires at least three processes: (a) ginning the raw cotton and baling the ginned cotton; (b) spinning the cotton into thread or yarn; and (c) weaving the thread or yarn into cloth. It may well be doubted that a practice is incident to or in conjunction with a farming operation, when it is as far removed from the growing of the product

as the making of cloth is from the ginning of the cotton. But the processing of cane into raw sugar is not similarly removed from the growing of the cane since, as the undisputed facts show, such processing must take place within a few hours after the cane is grown (R. 33, 731) and is therefore an integral part of the sugar cane growing.

Moreover, as the legislative history shows, Congress was fully aware of the fact that it was the practice of some farmers to process their own cane into sugar. Waialua's Br., p. 48.[9] There was no similar record made in the legislative history to show that a farmer ever processed and reprocessed his cotton crops into cloth. Hence the analogy of cloth-making by a cotton farmer, which the Employees seek to inject into the case, is purely hypothetical.

3. The Court of Appeals below concluded that all employees working in connection with the processing of sugar cane into raw sugar or molasses were within the agri-

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[9] As the Court below said in the earlier appeal herein (R. 830-831):

"But the raising and harvesting of sugar were specifically given consideration by Congress on account of the immense importance to the economy of this country as a whole. The text of the Act itself, the debates over the meaning of provisions, and especially the broad phrasing of the exclusions, indicates the intention that construction should be evenly balanced and not technical. The text reflects the feeling that, in troublesome times, the need for sugar may momentarily become vital. As to sugar, the all-year processing exclusion, in addition to the broad agricultural exclusion, indicates strongly congressional intent. Not only was it the desire to exempt processing as a part of the harvesting done by a farmer or on a farm, but also processing done by a third party. These provisions are not alternative or mutually exclusive, and should be liberally construed for the reasons given by this Court in *McComb* v. *Hunt Foods, Inc.*, 9 Cir., 167 F. (2d) 905, 908. It must be remembered that the construction given to this Act by the Court as to Hawaii, although not conclusive, will be generally applied to wheat farms and sugar plantations in continental United States.

culture exemption. The District Court, on the other hand, held that none of such employees was within such exemption (R. 736). The District Court did, however, grant a limited exemption during the cane grinding season under Section 7(c) to some of such employees, namely those working within the mill building and engaged in operating machinery to convert the sugar cane into raw sugar or molasses (R. 213, 310-317, 796-798) or bagging, loading and shipping the raw sugar or molasses (R. 317-318, 796, 798). The District Court did not hold the employees exempt under Section 7(c) when they were engaged in (a) repairing, maintaining and servicing the mill and its equipment, whether during the grinding or off seasons (R. 800-804)[10] or (b) handling bagasse (i.e., the residue of the cane left after grinding) or performing any operations in the fire room and power plant of the mill in order to generate steam and power required for the processing operations (R. 798).[11] The District Court's limitation of the Section 7(c) exemption to only some of these employees for a part of the year presents for consideration by this Court the application to all such employees of the agriculture exemption in Section 13(a)(6) of the Act.

[10] A limited exception to this was that the District Court held the employees exempt under Section 7(c) when they were engaged in cleaning and repairing the mill during the weekend shutdown (R. 798-800).

[11] Power was supplied at the same time and in the same workweeks for field and mill uses and also for uses that were not in commerce (R. 218-220, 762). The employees engaged in such power operations were thus in the same workweeks performing work not covered by the Act at all and work exempt under either Section 13(a)(6) or Section 7(c). In that situation they were clearly excluded from the overtime provisions of the Act in such workweeks. Waialua's Br., p. 82, footnote 50. The matter of commingled work is more fully discussed *infra*, pp. 41-42.

G. The Cases Arising in Puerto Rico, Upon Which the Employees and Secretary Rely, Are Clearly Distinguishable or Support Waialua's Contentions.

As shown in Waialua's Br., p. 58, *Bowie* v. *Gonzalez*, 117 F. (2d) 11 and 123 F. (2d) 387 and *Calaf* v. *Gonzalez*, 127 F. (2d) 934 involved a factual situation completely different from that involved here. Those cases involved employees who were transporting and processing sugar cane grown by several different farmers on several different farms, including both farms of their employer and also farms of independent growers. Here, however, there is only one farmer and one farm and the only cane transported and processed is grown by the farmer on that farm, and all transportation and processing are likewise confined to that farm.

The First Circuit itself emphasized in the *Calaf* case that the activities of "farmers preparing their goods for market or sending their goods to market, or to storage, or to carriers to transport from farms to market . . . are clearly exempt" and that in the case before the Court, the exemption would apply "if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm". 127 F. (2d) at 937-938. And when the same Court later had such a case presented to it, as in the *Vives* case, 145 F. (2d) 552, it held the employees exempt under Section 13(a)(6). *Supra*, pp. 18-19. So here, where all the activities of the employees in issue take place on the single farm of the employer and constitute practices incident to and in conjunction with Waialua's growing operations, all such activities fall within the exemption.

H. The Interpretations Announced in the Secretary's Brief As to Employees (i) Hauling Sugar Cane, (ii) Processing Sugar Cane, and (iii) Repairing and Maintaining Field Implements and Hauling and Processing Equipment and Facilities, Represent a Reversal of the Secretary's Previous Interpretations and Enforcement Policies.

The Secretary's views in any case must be evaluated in the light of certain settled principles. Under the statutory scheme, the "courts must apply the statute to this situation without the benefit of binding interpretation within the scope of the Act by an administrative agency." See *Bay Ridge Co.* v. *Aaron*, 334 U.S. 446, 461. The Act clearly "puts upon the courts the independent responsibility of applying *ad hoc*" the terms of the statute. *Kirschbaum* v. *Walling*, 316 U.S. 517, 523. The weight to be given an administrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140. Such interpretations are persuasive, for example, where they represent the "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549. On the other hand, they are not so persuasive where they seek to overturn long established administrative interpretations made soon after the Act went into effect and consistently followed. *Miller Hatcheries* v. *Boger*, 131 F. (2d) 283 (C.C.A. 8).

With these principles in mind, we now consider *seriatim* the Department of Labor's interpretations with respect to the activities here in issue.

1. *Hauling of sugar cane from the fields to the mill.*

a. In Interpretative Bulletin No. 14, paragraph 10(f), issued in 1939, the Department of Labor announced:

> "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term" [i.e. "practices . . . performed by a farmer . . . as an incident to or in conjunction with such farming operations"]. Waialua's Br., pp. 62, 99.

Such position has never been publicly changed by a republication of the bulletin or by a press release or by any other means bringing the change to the attention of employers, employees and the public generally. *And, significantly, neither before this action was started in 1947 nor at any time since, has the Secretary sought to enforce any different rule in Hawaii.* The plantations generally, including Waialua, have always treated all employees engaged in hauling sugar cane from the fields to the mill as exempt under Section 13(a)(6), and until the Department of Labor filed its first *amicus* brief in the instant litigation in the Court of Appeals, the Department had never even as much as hinted that the plantations were violating the Act.

b. The Secretary seeks to show that the Department had in fact changed its interpretation on sugar cane hauling after the *Calaf* decision (127 F. (2d) 934 (C.C.A. 1)) by referring to two documents (Secretary's Br., pp. 42-43): (i) the Department's findings and opinion, dated May 20, 1943, published incident to its approval of a wage order for the Sugar and Related Products Industry; (ii) a letter dated November 26, 1942, written by William B. Grogan, acting for the Administrator, to Mr. Paul Guillot of Paincourtville, Louisiana. Neither of these documents in fact represented any change in the position taken in ¶10(f) of Interpretative Bulletin No. 14.

We have set forth in the Appendix herein, pp. 51-52, *infra*, the pertinent part of the text of the Department's findings and opinion of May 20, 1943. As shown therein the Department affirmed ¶¶1-13 of Interpretative Bulletin No. 14 *in toto*, and that includes ¶19(f). Its statement that whether employees engaged in transporting sugar cane

from a farm to a mill are to be regarded as employed in agriculture "is a question of fact to be determined upon the basis of all the evidence and the applicable rules of law", is hardly the equivalent of the adoption by it of the principle of law which the Department alleges was laid down in the *Calaf* case. See also the Appendix herein, pp. 52-56, *infra*, where we set forth excerpts from the Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943. Such excerpts contain the discussions pertaining to the application of the "agriculture" exemption to cane transportation, which preceded the issuance of the wage order. They too show a reaffirmation by the Department of Interpretative Bulletin No. 14, including ¶10(f) thereof.

The letter to Mr. Guillot was in response to one addressed by Mr. Guillot to the Department under date of September 29, 1942. The full exchange of correspondence is set forth in the Appendix herein, pp. 56-60, *infra*. Mr. Guillot raised a question about sugar cane transportation and processing operations in Louisiana, where, *as his letter shows, the mill operators do not transport simply the cane they grow themselves but also transport cane grown by other farmers* which is processed at the mill. Moreover, since the letter in answer to Mr. Guillot was dated November 26, 1942, and preceded the Department's findings and opinion of May 20, 1943 (which reaffirmed ¶¶1-13 of Interpretative Bulletin No. 14), nothing said in that letter can be taken to detract from the Department's subsequent reaffirmation of such paragraphs. But if the letter does represent a change in the position asserted in ¶10(f) of the Bulletin, the subsequent shift back to ¶10(f), as revealed by the findings and opinion of May 20, 1943, shows that the Department's final position was that stated in the Bulletin.

c. The interpretations, which the Secretary seeks to apply here, are not, as we have seen, the initial interpretations made soon after the Act went into effect and consistently followed, but rather some newly devised interpretations

contrived to defeat Waialua's position under the circumstances herein. See cases cited *supra*, p. 25; see also pp. 29-30, *infra*.

The Secretary, citing *Dairymen's League Coop. Ass'n.* v. *Brannan*, 173 F. (2d) 57 (C.C.A. 2) (Secretary's Br., p. 45), argues that the Department's second thought is better than its first and hence should be followed. This, however, would lead to the dangerous precedent that the Department's third thought may be better than its second and so on. If the courts should then give weight to the Department's latest interpretation, whether it be the first, second, third, fourth, etc. interpretation, the resulting instability is obvious. *Cf. Ramspeck* v. *Trial Examiners Conference*, 345 U.S. 128, 143 note 9. The truth is that, encouraged by the District Court's decision herein, the Secretary is seeking to alter his interpretations radically and to gain judicial justification therefor, contrary to this Court's holding in *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25-26. In that case this Court declined to depart from a decision rendered under the Act five years before, pointing out that employers had regulated their affairs on the faith of the earlier decision.

2. *Processing of sugar cane.*

Paragraph 10(b) of the Administrator's Interpretative Bulletin No. 14 dealt with the term "preparation for market" appearing in Section 3(f) as an example of the type practices incident to or in conjunction with farming operations which are embraced by the definition of "agriculture." It stated in part that the term "preparation for market" included the manufacturing of raw sugar when performed by a farmer. Waialua's Br., pp. 62, 97, 98. Such interpretation was entitled to weight, since it represented "contemporaneous construction" of a new statute. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549. See also *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 283 (C.C.A. 8).

Following the decision in *Bowie* v. *Gonzalez*, 117 F. (2d) 11, however, the Department in September, 1941, issued a press release (WHM 35:355, Editor's Note) stating that, in the light of that decision, it was of the view that, contrary to the position taken in Interpretative Bulletin No. 14, the agricultural exemption does not apply to sugar mill employees even though the only cane they grind is that grown by the sugar mill owner in his own fields. The *Bowie* case, of course, stands for no such proposition, since the facts were that the mill ground not only cane which it grew but also a substantial amount of cane grown by a large number of growers who were wholly independent of the mill owner. *Such change of opinion by the Department, moreover, was inconsistent with the language of the exemption provision, its legislative history, the case law, and with the continued exemption of processing of other commodities such as fruit packing and canning, canning dairy products, cotton ginning and tobacco stemming, which are equally industrialized* Waialua's Br., p. 62.

The modified views issued by the Department of Labor, and relied upon by the Employees (Employees' Br., p. 43) and the Secretary of Labor (Secretary's Br., pp. 41-45), are simply a deliberate effort on the part of the Department to extend the holdings of the First Circuit concerning wholly distinguishable operations on Puerto Rican plantations. They were not adopted because of any administrative experience, discretion, or conclusion as to operations on or comparable to Hawaiian plantations. The best indication of this is the Secretary's statement (Secretary's Br., p. 4) that "the Department had nothing whatsoever to do with the institution of either the original action or the counterclaim, and it did not participate at all in either of the trial court proceedings." If the administrative interpretation had really changed years before this suit was filed, as argued in the Secretary's Brief (pp. 41-44), it is strange that the Secretary never sought to enforce against Hawaiian plantations the interpretations which he now

presses (Waialua's Br., pp. 63-64), and did not originate or join or otherwise participate actively over an eight year period in this litigation which the Secretary's Brief (p. 4) concedes to be so decisive.

3. *Repair and maintenance activities.*

Under the Secretary's present argument the agriculture exemption would be denied to employees engaged in repairing, maintaining and servicing (i) field implements, such as tractors and caneloading machines (R. 231-235, 239-243, 273-276), (ii) hauling equipment and facilities, including trucks (R. 220-223), field roads (R. 279-283) and the narrow gauge railroad (R. 206-212), and (iii) the cane processing machinery (Waialua's Br., pp. 87-88). Yet paragraph 12 of the Department's Bulletin No. 14 stated:

> "We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in Sec. 3(f). In our opinion such employees are exempt." Waialua's Br., p. 100.

It will be noted that the type of employees, mentioned by the Department as exempt, are employees who would be employed only by the largest farms. If, under the Department's interpretation such employees are exempt as being employed "in connection with" the activities described in the statutory definition of agriculture, then surely the employees engaged in the repair and maintenance activities here in question, which are indispensable parts of Waialua's farming operations, were likewise exempt.

The Department's interpretations, above set forth, issued in 1939, have never been modified and have remained outstanding until the present time, and the Department has never enforced any other rule in Hawaii. In this action, for the first time, the Secretary announces that the

agriculture exemption does not apply to these activities. This belated change of view by the Secretary should not be accorded any weight by this Court.

I. There is No Basis for the Employees' Argument (Br., p. 87) That the Opinion Below Would Give Hawaiian Sugar Plantations "An Unfair Advantage" Over Competitors in Puerto Rico and the Mainland.

The provisions of the Act apply equally to plantations on the mainland, in Puerto Rico, and in Hawaii, under the definition in Section 3(c). Waialua is not arguing for an interpretation of the Act which would apply its exemptions to Hawaiian plantations in a discriminatory manner. Any producer on the mainland or elsewhere, who processes his own cane alone into raw sugar, and is therefore in the same position as Waialua, should enjoy the exemption under Sections 13(a)(6) and 3(f).

Furthermore, no question of minimum wages is presented herein, since Waialua's employees receive hourly wages substantially above those required by the Act. The only issue herein concerns payment of overtime compensation to certain groups of employees. As regards Waialua's employees, who are exempt from overtime requirements under both Sections 13(a)(6) and 7(c), processors on the mainland and in Puerto Rico enjoy the same exemption from overtime requirements under Section 7(c), even if they are not farmers within the meaning of Section 13 (a) (6).

The Employees' argument confuses equal application of the Act under equal circumstances with competitive disparities which are wholly outside the ambit of the Act. In that connection, however, it is the Employees who would read into the Act limitations on agricultural methods and organization that would undermine the economic progress of producers and employees alike. The Department of Agriculture has recognized that mechanization is the key

to high productivity, sound competition, and improved labor conditions in sugar cane production.[12]

II. THE EMPLOYEES WERE ALSO EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT UNDER SECTION 7(c) WHEN ENGAGED IN THE ACTIVITIES IN ISSUE.

Since the Court of Appeals concluded that each employee was totally exempt from the Act under the agriculture exemption in Section 13(a)(6) in each workweek in issue (Waialua's Br., p. 15), the Court did not deem it necessary to consider the processing exemption under Section 7(c) (R. 746, note 45).

The District Court, for its part, did pass upon Section 7(c), holding exempt thereunder only the employees who worked in the mill building and who were (a) operating machinery which ground sugar cane into raw sugar or molasses, (b) cleaning or repairing such machinery within the mill building proper during the weekend shutdown, or (c) bagging, loading and shipping such raw sugar and molasses (R. 213, 310-318, 796-800). Waialua contends however that the Employees were aso exempt under Section 7(c) when engaged in any of the following:

1. Repair, maintenance and servicing of the mill and its equipment, whether performed in the mill building or in

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[12] See *The Marketing of Sugar Cane in Puerto Rico* (U.S. Department of Agriculture, 1950), p. 43:

> "It is felt that serious consideration should be given by the members of the industry to the following suggestions: . . . (6) That to continue to make a maximum contribution to the welfare of the economy, the sugar industry of Puerto Rico eventually must at least mechanize production operations to the extent necessary to maintain a competitive position with other areas in the market in which it sells sugar."

See also *Economics of Sugar Beet Mechanization in California* (U.S. Department of Agriculture, 1952), pp. 4, 10-12; *Science in Farming, Yearbook of Agriculture 1943-1947*, pp. 921-932.

the adjoining service shops, and whether performed during the grinding or off seasons;

2. The burning and disposal of bagasse in the fire room of the mill and generation of the power in the power plant of the mill needed in the grinding of the sugar cane;

3. The hauling of sugar cane produced by Waialua from the fields to the mill and repair, maintenance and servicing of equipment and facilities used in such hauling; and

4. Such other incidental operations as were necessary and indispensable to the foregoing.

We agree with the Secretary that the Section 7(c) exemption requires the showing that (a) the *employer*[13] is engaged "in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup" and that (b) the work of the *employees* takes place in the "place of employment" where their employer is "engaged . . . in the processing of . . . sugar cane". We submit that both factore were present here and hence the employees were exempt under Section 7(c) when engaged in the activities here in issue.[14] See Waialua's Brief, pp. 65-72.

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[13] The Secretary at one point in his brief incorrectly quotes the exemption as requiring an "employ*ee*" rather than the "employ*er*" to be engaged in the processing of sugar cane (Secretary's Br., p. 47).

[14] Contrary to the Secretary's statement (Secretary's Br., p. 49), nowhere does Waialua contend that the "place of employment" in the instant case was the entire plantation. Waialua contends simply that the "place of employment" embraced not only the mill building but also all other areas on the plantation where operations necessary and indispensable to cane processing were carried on. See Waialua's Brief, pp. 66-67.

A. The Service Shops Employees Were Performing Activities Which Were an Integral Part of Waialua's Single Enterprise of Growing and Processing Sugar Cane.

1. The fundamental fallacy in the Employees' argument with respect to the employees attached to the service shops is their insistence that because such employees were departmentalized and more or less specialized in doing only repair work, they were necessarily engaged in an enterprise separate from Waialua's growing and processing operations (Employees' Br., pp. 52-54). Merely because Waialua's employees might have been assigned to simply one activity or one group of activities, as, for example, the hauling of cane to the mill or the grinding of cane in the mill or the repair of the tools and equipment used in the growing, hauling and processing operations, it does not follow that they were thereby engaged in separate enterprises. *Supra*, pp. 7-12. All of these activities were simply an integral part of Waialua's single enterprise of growing and processing sugar cane. As the District Court found:

> "Both field and mill operations necessitate the equipping and maintaining of complete service shops for prompt minor repairs and emergency work and major overhaul" (R. 763).

And as the parties stipulated:

> "Machinery breakdowns in the mill may result in a shutdown of the entire mill which, in turn, necessitates a discontinuance of harvesting and transportation operations until mill repairs are complete. Breakdown of harvesting machinery or of cane transportation facilities in turn may result in a shutdown of the entire mill (R. 94). . . . In case of equipment failures [in the mill], the engine tenders, assisted by other crew members, perform repair work under the direction of the shift engineers. Employees in the welding shop, machine shop and blacksmith shop, however, are called upon to do most of the repair work requiring welding or machining. All repair work required during processing operations to restart equipment must

> be handled immediately to avoid serious sugar losses in burned and harvested cane and in cane and cane juices being processed and to avoid costly mill cleaning operations" (R. 76).

In the light of these facts it is sheer fantasy for the Employees' Brief to describe Waialua's repair shops as a "separate" enterprise. All the work performed by the employees in such repair shops related either to Waialua's field or processing operations or to its mill village operations which were too remote from "commerce" to be covered by the Act at all. Waialua's Br., pp. 73 *et seq.*

2. The Employees contend that if employees of an independent machine repair shop performed the activities here involved, they would not be exempt from the Act, and therefore the fact that the work is done by Waialua itself —the single owner of the entire plantation operation—affords no basis for applying the exemption (Employees' Br., p. 54, note 27). The Employees' premise is erroneous. If repair work is done for a farmer upon a farmer's machinery and equipment by an independent machine repair shop, or if trucks are repaired by an independent garage or automobile dealer, such work is exempt from the wage and overtime provisions of the Act under the retail and service establishment exemption provided by Section 13 (a)(2). The Department of Labor has ruled that that exemption applies to the independent farm implement dealer and the independently-owned farm equipment repair shop. See Title 29, Code of Fed. Regs., Ch. V, Part 779 (15 Fed. Reg. 7245) Sec. 779.9(b); 3 CCH Labor Law Reporter, § 24,105.09(b).

B. The Section 7(c) Exemption for the Processing of Sugar Cane is Not a Seasonal Exemption as Contended By the Employees.

The Employees' assertion that the purpose of Section 7(c) is to grant seasonal exemptions (Employees' Br., pp. 50-51) confuses Section 7(c) with Section 7(b)(3) of the

Act, which grants a limited 14 workweeks exemption per year from overtime requirements to industries "found by the Administrator to be of a seasonal nature" and is therefore the section of the Act relating to seasonal exemptions.

It is true that certain of the exemptions in Section 7(c) are also limited to 14 workweeks per year and hence may also be considered seasonal exemptions. But this is not true as to the processing of sugar cane, which is specifically granted a year-round exemption under Section 7(c),[15] along with the first processing of milk, etc., into dairy products, the ginning and compressing of cotton, and the processing of cottonseed. Such exemptions are wholly unrelated to seasonality. The decisions, therefore, relating to the 14 workweeks exemptions in Section 7(c), such as the exemption for handling, slaughtering and dressing poultry or livestock, have no application here.

The legislative history of the Act also shows that seasonality of operations played no part in the enactment of the year-round exemptions in Section 7(c). Rather Congress was concerned with avoiding the imposition of additional costs upon the farmer, which the processor would pass back to him if the overtime requirements of the Act were thrust upon the processor. Waialua's Br., pp. 54-55.

C. The Interpretations of Section 7(c) Sought in the Secretary's Brief Constitute a Sharp Departure From Administrative Interpretations Originally Announced and Long Followed.

The Secretary of Labor is seeking a formalistic or hypertechnical interpretation of Section 7(c). A close examination of the Secretary's argument shows that he would limit the sugar cane processing exemption to the employees

[15] In view of the fact that the Section 7(c) exemption for the processing of sugar cane is a year-around exemption without limitation, the District Court erred in denying the exemption to the employees when performing repair and reconditioning work on the mill and its equipment while the mill was shut down for the off season (R. 800-801).

working in the building where the sugar cane grinding takes place. Secretary's Br., pp. 48-50. He would deny the exemption to employees performing activities which are necessary to the processing, if such activities are not performed in the mill building where the "actual" grinding of the sugar cane occurs (*Id.*, p. 49). Necessarily, then, he would deny the exemption to employees who keep the mill in repair but do the repair work in adjoining service shops and to employees who transport the cane from the fields to the mill.

The Section 7(c) interpretations which the Secretary now seeks are completely novel and contrary to the positions which the Department of Labor has taken from the beginning under the Act. Thus, as to the transportation of sugar cane from the fields to the mill, the Department ruled in paragraph 22 of Interpretative Bulletin No. 14, which was released in 1939, that

> ". . . truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment' . . . " Waialua's Br., p. 71.

The Department has also ruled that employees of a sugar mill engaged in transporting the raw sugar to a warehouse seven miles removed from the mill are exempt. WHM 35:769. See also the additional interpretations of the Department set forth in Waialua's Brief, pp. 70-72, 102-103. None of these interpretations has ever been modified or revoked. It is obvious, therefore, that the Department has frequently regarded employees as working in the place of employment within the meaning of Section 7(c) even though they worked in places many miles away from the place where the sugar cane grinding, fresh fruit canning, etc., occurred. Moreover, this is the basis upon which the Secretary has always enforced the law with respect to Hawaiian sugar plantations and is enforcing it today.

D. The Puerto Rico Cases Support Waialua's Contention as to Section 7(c).

The Secretary denies (Secretary's Br., p. 51, note 9) that these cases (*Bowie* v. *Gonzalez*, 117 F.(2d) 11, and *Calaf* v. *Gonzalez*, 127 F.(2d) 934) assumed that cane transportation was exempt under Section 7(c). He does not deny, but in fact admits, however, (Br., pp. 28, 29) that in those cases transportation was held "incident to milling." And in the *Calaf* case, *supra*, the facts were that the transportation employees there involved worked over forty hours during a week, did not receive any overtime compensation, and neither sought nor were allowed any overtime recovery.[16] These facts, we submit, warrant the conclusion that the First Circuit *did assume* that the Section 7(c) exemption was applicable to cane transportation employees.

The Secretary takes inconsistent positions. The Secretary urges (Br., pp. 28-29), as do the Employees (Br., pp. 44, 45), that the agriculture exemption does not extend to cane hauling performed by the employees because the Puerto Rico cases held that hauling was incident to milling rather than to farming. On the other hand, they disagree with Waialua's contention that the Section 7(c) exemption extends to such cane hauling because it is incident to milling.

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[16] While the District Court wrote no opinion in the *Calaf* case and these facts do not appear in the appellate court's opinion, we have, nevertheless, obtained such facts from an examination of all the pleadings and related papers in the file in the case available in the United States Department of Labor. The Secretary is mistaken, therefore, in stating (Secretary's Br., p. 51, note 9) that there is nothing to indicate whether the employees in the *Calaf* case worked any overtime hours or sued for overtime compensation. The *Calaf* case did not involve any 7(c) issue, or any overtime compensation issue whatever. The issues in the *Calaf* case were minimum wage issues which arose under the agriculture exemption. A similar situation existed in the *Bowie* case.

E. The Principal Cases Relied Upon By the Employees and the Secretary are Wholly Distinguishable.

The Secretary and Employees rely principally upon *Walling* v. *Bridgeman-Russell Co.*, 6 Labor Cases, ¶ 61,422 (D. Minn.); *Shain* v. *Armour*, 50 F. Supp. 907 (W.D. Ky.); and *Fleming* v. *Swift*, 41 F. Supp. 825 (N.D. Ill.) (Secretary's Brief, pp. 50, 54-55; Employees' Br., pp. 51-52, 55). Such cases are not in point. None of these cases holds that employees engaged in repair or maintenance work or in generating steam and power for exempt operations of their employer are not themselves exempt. They hold only that the Section 7(*e*) exemption does not apply to repair and maintenance employees, etc., who perform work for both exempt and nonexempt operations of their employer. For example, in the *Bridgeman-Russell* case, *supra*, certain employees were producing steam and power for the making of butter—an exempt process under Section 7(e)—and also for the making of ice cream and ice cream mix, which were not exempt under Section 7(e). But in the case at bar the repair and maintenance work and the work of generating steam and power are in no way related to any nonexempt operations of Waialua; rather they are simply integral parts of Waialua's sugar cane processing operation. Accordingly the employees engaged in such work fall within the Section 7(*e*) exemption.

F. The Section 7(c) Exemption Applies to the Employees Engaged in the Burning of Bagasse and Generation of Power in the Fire Room and Power Plant of Waialua's Mill.

As recognized by the Employees (Employees' Br., p. 54) and the Secretary (Secretary's Br., p. 53), the employees engaged in the fire room and power plant operations fall within the language of Section 7(e), even as narrowly construed by them, because such employees worked in the mill building proper, i.e., the fire room and power plant of such building (R. 723), the place where the employer was "engaged . . . in the processing of . . . sugar cane." But the

Employees and the Secretary nonetheless argue that the District Court was correct in denying the exemption to these employees because their duties "included the production of electric power for covered activities of their employer not excluded by this or any other exemption from the overtime compensation provisions of the Act". Secretary's Br., p. 53; see also the Employees' Brief, p. 54. They refer in this connection to power being used by the plantation railroad, roundhouse and office, which they state are covered and nonexempt (*Id.*) But, as the parties stipulated:

> "In extracting the juices from the sugar cane, one of the by-products is the cane fibre from the cane stalks, which is referred to as bagasse. When dried, one ton of bagasse has a fuel value approximately equivalent to two barrels of fuel oil. As indicated above, the extraction of the juices from the cane fibre and the processing of sugar cane into raw sugar require large amounts of power for the operation of the prime movers, conveyors and pumps. *It is therefore traditional in sugar cane processing to utilize the bagasse as an economical source of fuel for the production of power for use in performing the various processing operations.* An average of approximately three thousands tons of bagasse is produced each week when the mill is operating at full capacity. Fuel is also essential in the processing operations for the production of steam for heating and evaporating of the juices and the crystallization of the sugar. Fuel is also used to produce steam for the generation of electric power needed in the various operations of the plantation, as will be hereinafter more fully described. If the bagasse were disposed of as waste, other fuel would have to be obtained in order to obtain steam. *If the bagasse were not utilized as fuel, a difficult disposal problem would be presented because of its bulkiness and the large volume involved. Bagasse produced by the plantation has no marketable value*" (R. 85-86). [Emphasis supplied.] See also the District Court's findings (R. 761-762).

And as found by the District Court:

> "The power plant supplied power to the mill, field irrigation pumps, all the repair and service shops and related buildings, domestic water pumps, plantation houses, village services, and even several non-plantation users living in the plantation community who, because of their location, could more conveniently be served from plaintiff's lines than from the Hawaiian Electric Company" (R. 218).[17]

The District Court further found:

> "The total amount of power used by non-plantation users is about one-half of one per cent of all the power distributed by plaintiff. None of it is used for or in connection with the production of goods for commerce, or to operate any instrumentalities of interstate commerce, or transmitted into interstate commerce". (R. 762).

Thus, aside from the furnishing of power for agricultural uses and for uses which were not "in commerce," the power plant supplied power only as a necessary incident to the milling of sugar cane. It supplied no power for covered and nonexempt activities. In other words, the employees working in the power plant of the mill (R. 218-220) produced power for use in the field and mill operations of Waialua and at the same time produced power for use in the plantation dwelling houses and by non-plantation users. None of such latter power was used for or in connection with the production of goods for interstate commerce or to operate any instrumentalities of interstate commerce, nor was any of it transmitted into interstate commerce. To the extent that the employees in the power plant produced power for the field or mill operations of Waialua, they were performing work exempt under the agriculture and Section

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[17] Nothing in the Record, therefore, supports the Secretary's and Employees' statement that electric power was furnished by Waialua's power plant to Waialua's railroad or office.

7(c) processing exemptions, and to the extent that in the same workweeks they were supplying power for village use or for non-plantation users, they were performing work not covered by the Act at all. In performing both work that was exempt and work not covered by the Act in the same workweeks, the employees were excluded from the overtime provisions of the Act in such workweeks. Waialua's Br., p. 82, note 50.[18]

The cases cited by the Secretary (Secretary's Br., pp. 55-56) and Employees (Employees' Br., pp. 55-57) are not in point, for in all of them the employer was engaged in two separate businesses, one within the exemption and one outside it, and the courts properly held those employees nonexempt who engaged in the business extraneous to the exempt business. In the case at bar, however, the Employees were engaged either in the growing of sugar cane which was exempt under Section 13(a)(6) or in the processing of sugar cane which was exempt under both Section 13(a)(6) and Section 7(c). Nothing they did was extraneous to Waialua's production and processing of sugar cane. The cases relied upon by the Secretary and Employees would be in point only if Waialua were engaged in some extraneous business which is not covered by any exemption, such as the making of rum, the distilling of whiskey, the manufacture of candy, etc. But the Record shows that every single activity performed by the employees which is here in question was part of Waialua's operations of producing and processing sugar cane.

[18] Because of an existing tie-in between its power system and that of the Hawaiian Electric Company, Waialua, on rare occasions when it generates more power than it needs, feeds back such power into the system of Hawaiian Electric. But as the District Court found (R. 762, note) and the parties stipulated (R. 92), such power is not fed back in order to sell same but only because it is a necessary, convenient and economical method of disposing of the excess power.

III. THE EMPLOYEES, WHEN ENGAGED IN REPAIRING DWELLINGS AND MAINTAINING RELATED DOMESTIC FACILITIES, WERE NOT ENTITLED TO THE BENEFITS OF THE OVERTIME PROVISIONS OF THE ACT.

This aspect of the Employees' Brief (pp. 61-71) is fully answered in Waialua's Brief (pp. 73-82).[19] We wish only to reemphasize that a comparison of the crucial statutory language defining the scope of the Act's coverage, on the one hand, and the scope of the agriculture exemption on the other, demonstrates that if the activities of these employees is held to be covered by the Act, such activities must necessarily be held exempt under Section 13(a)(6). Waialua's Br., pp. 81-82; see also pp. 3-4, *supra*. The legislative history of the agriculture exemption, revealing the comprehensive character of the exemption (Waialua's Br., pp. 45-55), shows also that the words of the exemption, which include practices incident to or in conjunction with farming, were intended to be at least as broad as the words used to define the scope of the Act's coverage.

IV. ANY EMPLOYEE, WHO, IN A WORKWEEK PERFORMED WORK EXEMPT UNDER SECTION 13(a)(6) OR SECTION 7(c) AND DID NOT DEVOTE A SUBSTANTIAL PART OF HIS TIME IN THE SAME WORKWEEK TO AN ACTIVITY WHICH WAS NOT SO EXEMPT, WAS EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT DURING THAT WORKWEEK.

1. This aspect of the Employees' Brief (pp. 71-75) is fully answered in Waialua's Brief (pp. 82-84). We wish to add that this Court has had occasion to consider the problem of exempt and nonexempt work performed in the same workweek only in the case of the exemption provided by Section 13 (b)(1) of the Act for interstate motor carriers. This Court ruled that if the duties of the job performed by

[19] As previously observed, p. 2, note 1, *supra*, the Secretary states in his brief that he has never expressed an opinion on this matter, nor does he do so now. Secretary's Br., p. 3.

the employee are such that he is, or is likely to be, called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities, he is exempt under Section 13(b)(1) in all workweeks when he is employed at such job, regardless of the portion of his time and activity actually devoted to safety-affecting work, and even though in particular workweeks he may not actually engage in any activities directly affecting safety of operation. *Morris* v. *McComb*, 332 U.S. 422. See also *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695, 707-709; *Levinson* v. *Spector*, 330 U.S. 649, 675-676, 679 *et seq.*; and the Department of Labor's statement on the scope of the Section 13(b)(1) exemption, Title 29, Chap. V, Code of Fed. Reg., Part 782 (13 F.R. 2346) Sec. 782.2(b) and (c); 3 CCH Labor Law Reporter ¶24,108.02(b) and (c).

2. So far as the Secretary's Brief is concerned, the Secretary admits that in order to give substance to various exemption provisions in the Act, other than Sections 13(a)(6) and 7(c), it was necessary to allow tolerances of nonexempt work. Secretary's Br., p. 65. He contends in this connection that in such other exemption provisions, the exempt occupation is designated only by an undefined word or phrase. *Id.*, p. 64.[20] He argues, however that to allow

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[20] One of the exemptions to which the Department has accorded a 20% tolerance of nonexempt work is the Section 13(a)(5) fishing industry exemption. Waialua's Br., p. 105. To refer to such exemption as one designated by simply an undefined word or phrase is absurd in view of the fact that Section 13(a)(5) exempts as follows:

> "any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing, or distributing the above products or byproducts thereof."

Another exemption for which the Department has allowed a 20% tolerance of nonexempt work is the Sec. 13(a)(15) exemption

similar tolerances under the exemptions granted agriculture and the processing of perishable agricultural crops would defeat the purposes of the Act. Secretary's Br., pp. 62-63, 63-64, 65. He states:

> ". . . the exemptions themselves [Secs. 13a (6) and 7(c)] state both the type of work for which the exemption is designed and a tolerance for related work. Sections 13(a)(6) and 7(c) exempt not only those directly engaged in the operations specifically mentioned, but also others whose work is 'incident to or in conjunction with' such operations (section 13(a)(6)) or who perform incidental work in the same place of employment (section 7(c)) (Secretary's Br., pp. 59-60) . . . This language [the language of Sec. 3(f) defining 'agriculture'] in itself provides a substantial tolerance for activities which are not of a strictly agricultural nature (Secretary's Br., pp. 63-64) . . . the Department is of the view that the tolerance specifically provided by the particularized language of the agricultural exemptions need not be broadened to accomplish the purposes of these exemptions, whereas the tolerances permitted under certain other sections of the Act are necessary to give substance to those exemptions." (Secretary's Br., p. 65).

The Secretary confuses the scope of an exemption with the concept of tolerance of nonexempt work. Whether the scope of an exemption be great or small, or whether it be stated in one word or many, or whether it does or does not include incidental activities, the scope of the exemption is separate and distinct from the allowance of a tolerance.

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for forestry or logging operations. Waialua's Br., p. 105. It is also absurd to characterize that exemption as "an undefined word or phrase", for it exempts

> "any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed twelve."

The problem of tolerance arises only where an employee, whose principal activities in a workweek come within the scope of an exemption, also engages in the workweek in a relatively small amount of additional activities. As above indicated, that problem is the same whether the scope of the exemption be great or small, or whether it be stated briefly or with the use of many words, or whether it does or does not include incidental activities. If, for example, transportation or processing comes within the scope of the agriculture exemption, the problem of tolerance is the same whether the exemption expressly specifies transportation or processing, or whether transportation or processing is included within the exemption as a practice incident to or in conjunction with farming operations.

As shown *supra*, p. 44, note 20, the Department allows a tolerance of up to 20% of nonexempt work in the case of the fishery exemption under Section 13(a)(5), where the scope of the exemption is great and where it is stated with the use of many words and where it includes incidental activities (going to and from work, loading and unloading, processing, marketing, etc.). The same principle should apply with respect to the agriculture exemption under Section 13(a)(6) and the processing exemption under Section 7(c).

V. THE COURT OF APPEALS ERRED IN ORDERING DISMISSAL OF WAIALUA'S DECLARATORY JUDGMENT SUIT ON THE GROUND THE PARTIES WERE IN "APPARENT COLLUSION".

The Employees' Brief (pp. 76, 80) fully concurs in Waialua's position, stating that "the controversy existed for many years before the suit was filed, and it exists today". Far from being in "collusion", Waialua and the employees were and are vigorous antagonists. Waialua's Brief, pp. 25-32; Employees' Brief, pp. 76-81. However, the Employees' Brief (p. 5) makes incomplete reference to earlier litigation under the Act, which took place prior to

the filing of the instant suit and counterclaim. The facts are:

On November 14, 1945, numerous employees of Waialua, including some of the employees here involved, filed suit under Section 16(b) of the Act in the United States District Court for the District of Hawaii, to recover unpaid overtime compensation allegedly due. *Takenaka et al.* v. *Waialua Agricultural Co. Ltd.*, D.C. Hawaii No. 640. Similar suits were also filed against all other Hawaiian sugar plantations by employees of each plantation, respectively. Thereafter each of the plantations, including Waialua, and the employees involved entered into a stipulation settling the pending suit by payment of a designated sum, and consenting to the entry of judgment for the plaintiffs in the suit, without conceding the plaintiffs' contentions therein. The payments were distributed to the employees by the Union representing them, namely, International Longshoremen's and Warehousemen's Union. The judgment entered January 25, 1946 against each plantation, including Waialua, specifically recited that:

> "In any litigation which may hereafter occur between the plaintiffs or any of them and said defendant, including the respective privies of the plaintiffs or any of them or of said defendant, with respect to liability under the Fair Labor Standards Act for any period subsequent to the 25th day of January, 1946, neither . . . this judgment shall operate as res judicata or as an estoppel or otherwise as determinative or evidentiary with respect to the application of the Fair Labor Standards Act or of any of its provisions to the plaintiffs or to any of them or to the defendant or to any of said privies or with respect to any issue of fact or issue of law which is or which has been or which might have been raised in the above entitled cause."

See *Record* in this Court, *Waialua Agricultural Company, Ltd.* v. *Maneja et al.*, October Term 1949, No. 588, pp. 6-7.

On or about the date that judgment was entered against each of the plantations, the aforesaid Union and the sugar-

cane plantations, including Waialua, agreed to institute and prosecute test suits to adjudicate the disputed interpretations of the Act. In April 1947, Waialua filed this suit, since the Waialua plantation was deemed typical and representative, so that the decision in that test case, all as explained by the Employees' attorney at the first trial (R. 840), would apply to all plantations and thereby resolve the serious and continuing controversy. The ensuing steps are explained in Waialua's Brief, pp. 6-11.

The Stipulation, which is set forth in full in the record, simply described the known and undisputed facts concerning Waialua's operations and the activities of the individual employees. *Id.*, pp. 11-14. This followed recognized practice in litigation under the Act. E.g., *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 661-662. The Stipulation carefully avoids conclusions of law as to commerce coverage or statutory interpretation. At no time did the parties enter into an "agreement on commerce coverage", as stated in the Employees' Brief, pp. 78, 80 note 46. All parties independently assumed in good faith that the employees (except those working in the mill village) were engaged in the production of goods for commerce. See Waialua's Brief, pp. 31-33. That assumption was compelled by applicable decisions of this Court, including *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 759. There could be no basis for criticism even if the parties had actually stipulated that the employees (other than those in mill village work) were engaged in the production of goods for commerce. E.g., *Madison Avenue Corp.* v. *Asselta*, 331 U.S. 199, 201; *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 391.

Waialua submits that the parties are to be commended rather than condemned for their bona fide efforts over a period of eight years to submit their respective positions and contentions to the appropriate court, by all practical and legal procedures looking to final judgment on the merits. The fact that such judgment would be decisive of similar issues affecting all Hawaiian sugar plantations and

large segments of continental agriculture simply underscores the importance of the suit and the desirability of declaratory relief.

CONCLUSION

The instant case is but one part of a four-pronged effort by Hawaiian plantation employees to obtain overtime compensation after 40 hours of work in a workweek. The other three prongs are: (i) efforts directed at the Hawaiian legislature to have the Territorial wage and hour law amended to require payment to employees on Hawaiian sugar plantations of overtime compensation after 40 hours of work in a week, instead of after 48 hours as at present under the Revised Laws of Hawaii 1945, Title 9, Ch. 75, § 4354[21]; (ii) efforts directed at the Congress to have the Fair Labor Standards Act amended so as to obtain overtime compensation for Hawaiian sugar plantation workers for hours worked in excess of 40 in a week[22]; and (iii) efforts in collective bargaining since 1945 between the Hawaiian plantations, including Waialua, and representatives of the plantation employees, to obtain such overtime compensation for the plantation employees.

The foregoing demonstrates that the Employees themselves recognize that under the Act as it presently stands, they are not entitled to the overtime benefits of the law, and that the proper avenues for obtaining such benefits are either thru collective bargaining or amendatory legisla-

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[21] See following bills, introduced in the legislature of the Territory of Hawaii: *Senate* Bill No. 45 (Feb. 21, 1947); *Senate* Bill No. 203 (Feb. 18, 1955); *House* Bill No. 517 (Feb. 25, 1955); *House* Bill No. 597 (March 1, 1955).

[22] Waialua's Br., p. 53.

tion. *Cf. Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 617.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF LABOR'S FINDINGS AND OPINION, TRANSCRIPT OF PROCEEDINGS OF INDUSTRY COMMITTEE FOR SUGAR AND RELATED PRODUCTS INDUSTRY, AND OPINION LETTER DEALING WITH APPLICATION OF SECTION 13(a)(6) TO CANE TRANSPORTATION

1. *Findings and Opinion of May 20, 1943 published incident to Department's approval of a wage order for the Sugar and Related Products Industry (8 F. R. 7098).*

> "No objection to the definition of the Sugar and Related Products Industry was offered by any interested party at the public hearing before Major Campbell. Objection was, however, raised in a brief filed with the Committee by the American Sugar Cane League of the U. S. A., to that part of the definition which reads: 'The production of any products covered under this definition shall be deemed to begin with the loading of the raw materials at the farm.' Objection to this language was also voiced by Mr. Ernest W. Greene, Washington, D. C., a representative of the employers on the Committee. A proposed amendment of the above language was offered on behalf of the Hawaiian Sugar Planters Association. I have carefully considered these objections and suggestions upon the evidence in the record. Any apprehension that the language in question may be regarded as including agricultural employees who are exempt from the Act's minimum wage provisions under Section 13(a)(6) is hardly justified in view of the fact that Administrative Order No. 162 appointing Industry Committee No. 50 and defining the Sugar and Related Products Industry, specifically excepted from the scope of the Committee's jurisdiction 'employees exempted by virtue of the provisions of Section 13(a) * * * .' "*

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* "Administrator's Exhibit 1-A, paragraph 4. Whether or not a particular employee engaged in loading or transporting sugar cane from a farm to a mill is to be regarded as 'employed in agriculture,' as agriculture is defined in Section 3(f) of the Act, and hence exempt from the minimum wage provisions of the Act under Section 13(a)(6), is a question of fact to be determined upon the

2. *Excerpts from Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943.*

"MR. GREENE: May I ask a question at this time, Mr. Chairman?

"CHAIRMAN KREPS: Surely.

"MR. GREENE: Greene is my name. I wish to speak to the point of this brief to the extent of its comment on the definition. My comments have nothing to do with Mr. Winston's. In the second paragraph of the definition contained in the Administrative Order it says: 'The production of any products covered under this definition shall be deemed to begin with the loading of the raw materials at the farm.' That definition in the light of the Interpretative Bulletin No. 14, issued some time ago by the Wage and Hour Division, was a little confusing to many of us, not as an argumentative or technical point but merely as a matter of clarity and of knowing where these wages which we are now discussing are to begin, and in the economic data we find that the case of *Calaf et al.* vs. *Gonzales et al.* is cited as authority for the definition, which would deny exemption to any employees even of the owner of a farm engaged in transporting sugar cane from the farm to the factory on the ground of the decision in that Calaf case insofar as the layman can read it. That decision was based upon conditions peculiar to Puerto Rico, an area not covered directly by the Act, to which the Act applies only when specially invoked for it by a special Committee, not a Committee such as this, and conditions which do not obtain generally throughout certain

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basis of all the evidence and the applicable rules of law. See Interpretative Bulletin No. 14, paragraphs 1-13. See also the decision of the Circuit Court of Appeals for the First Circuit in the case of *Calaf* (*Collazo*) v. *Gonzalez*, 127 F. (2d) 934, where it was decided that the Section 13(a)(6) exemption was inapplicable to employees engaged in transporting sugar cane from their employer's farm to their employer's sugar mill, even though the cane was grown by the employer of the employees in question. See also the decision in the case of *Gonzalez* v. *Bowie*, 123 F. (2d) 387 (C. C. A. 1), to the effect that the Section 13(a)(6) agricultural exemption was inapplicable to employees transporting sugar cane of independent growers to their employer's sugar mill."

other sugar cane producing areas. We find a recognition of that by the Court when the decision contains the following: 'We would be presented with a very different problem if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located on the farm.'

"Now without laboring any lengthy discussion, it is customary in the territory of Hawaii for a sugar cane farm to be a large scale farming unit complete with a processing plant for grinding the sugar cane and producing raw sugar located at some convenient point on the farm with the farm containing a transportation system for serving that, the fields and the plant, and the situs of the employment of the workers in the heart of the transportation system is very decidedly on the farm. Now I realize that nothing that is put out by way of definition and nothing that I or anyone else on this Committee can say can change the statute or the decision of a court, but I do wish to point out that this definition, which has been set up to guide us as to where these wages which we are discussing would apply, seems to me to ignore the language of the court which applies directly to conditions which exist in many cases in Hawaii and I believe that the distinguished member from Louisiana will agree that it applies also to many cases in Louisiana where you do not have the separate farm property, separate mill property, visualized in a court decision that apparently existed in that case. I wish to bring to the attention of the Committee that that definition seems to me to be out of order.

"CHAIRMAN KREPS: Thank you, Mr. Greene. Does anyone else wish to speak to this particular point?

"MR. SHISHKIN: Mr. Chairman.

"CHAIRMAN KREPS: Mr. Shishkin.

"MR. SHISHKIN: It seems to me that the brief just discussed raises a question of definition and it might be useful for the Committee to hear a representative of the Wage and Hour Division read the present definition and also indicate to the Committee the extent of coverage of the Fair Labor Standards Act in terms of the statutory minimum wage application to the industry at the present time so that we will have a clear idea as to the extent to which the Act applies.

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"CHAIRMAN KREPS: The brief and certain legal aspects have been called into question and I suggest we therefore turn to the staff. May I ask Dr. Klingenfeld to speak to this point?

"MR. KLINGENFELD: Mr. Chairman, I should like at this time to refer the matter to our economist, Mr. Hughes, who will take up the definition in connection with his study, and also will speak to the point raised by both Mr. Greene and Mr. Shishkin. If that is all right with you, I should like to refer the thing to Mr. Hughes in his general presentation of a report.

"CHAIRMAN KREPS: Mr. Hughes will explain the economic report, of which all of us have been given a copy.

"MR. HUGHES: First with respect to the definition, the intention behind this definition was to put together in one industry as many competitive products and essential processes as possible so as to bring them to the attention of the Industry Committee with dispatch. There is no question but what refined sugar and beet sugar are competitive, nor is there any question but what raw cane sugar and beet sugar are competitive even though raw cane sugar has to be further processed before being used. The processing of sugar cane into raw cane sugar is competitive with the processing of sugar cane into syrup inasmuch as both processors have to compete for sugar cane in some areas, and in those areas where sugar cane syrup manufacturers and raw sugar manufacturers are located within the same vicinity they have to compete for labor. All the syrups covered herein are competitive with sugar to the extent that they are used as substitutes for sugar, and maple syrup, of course, is covered because of its competition with sugar cane syrup and sorgo syrup.

"With respect to the operations covered, the intention behind the definition is to cover all those which were not otherwise exempt. The definition does not and cannot cover any operations which are specifically exempt from the wage provisions of the Act. Thus, any operations which are now exempt as being agricultural under Section 13(a)(6) of the Act would remain exempt and any operations which now get the benefit of the area of production exemption, Section 13(a)(10), would also remain exempt. The establishments which would be primarily covered by this definition are cane sugar refineries, raw sugar factories, syrup manufac-

turers, and beet sugar factories. As indicated in the report, these establishments are pretty generally distributed over the entire United States, with certain types of establishments being centralized in certain areas, as, for example the manufacture of raw sugar in Louisiana, Hawaii, and Florida, and beet sugar factories being located principally in the Middle West and Far West.

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"CHAIRMAN KREPS: Any other questions any of the committee members would like to ask of Mr. Hughes? I am wondering whether Mr. Brown might give us some—returning to the point of the definition—whether Mr. Brown would like to give us his views on the question of definition as stated in the paragraph which has been challenged by some members of the committee.

"MR. BROWN: I want to say a few words on that. As Mr. Hughes stated at the outset, any definition in any case including this one is subject to whatever exemptions may already exist in the act, and insofar as there is an exemption in 13(a)(6) of the act for agriculture, why of course any definition of this industry would be subject to that exemption.

"Now, that exemption, of course, exempts from minimum wages and overtime, activities which are deemed agriculture. Now, however the act does not go into great detail as to what activities are deemed agriculture and those which are not, and the Interpretative Bulletin No. 14 that was mentioned is merely the Division's opinion of what the courts will consider to be agriculture; and as a matter of fact there have been a few cases on that point, not very many, but some important ones, so that the thing to bear in mind is that there is no danger of fixing a minimum wage or anything that should not be fixed, should not be covered under this definition because the courts will eventually, and have already begun to indicate which activities on the farm and off the farm, are to be deemed agriculture. I don't think that we here in the Wage and Hour Division are prepared to go into any detail now, or could, even if we wanted to, go into detail to indicate what activities will be deemed agriculture and which will not. That is up to the courts.

"With respect to that particular point about the defi-

nition, namely the second paragraph, and that the production or any production covered under this definition should be deemed to begin with the loading of raw materials at the farm, why insofar as any of that loading will be held to be deemed part of farming and part of agriculture, of course that loading by a farmer or on a farm may be held by the courts to be agriculture and outside of the scope of this definition; but insofar as the courts may hold and might hold that certain loading by a mill of raw materials may be deemed to be not agriculture but merely part of grinding, why then it will be covered, but as I say that is something that will depend upon two things, the facts in each particular case and the courts will have to go into the facts to determine whether or not the loading is incidental to agriculture or incidental to milling and then upon those facts the courts will tell us whether it is to be exempt under 13(a)(6) or not.

"I think that is all I can tell you right now because it isn't for the Division to give a ruling or binding interpretation as to the definition." *Excerpts from Informal Hearing and Meeting of Industry Committee No. 50 for Sugar and Related Products Industry* held January 5, 1943, pp. 9-12, 12-14, 24-26.

3. *Exchange of letters with Mr. Paul E. Guillot, Paincourtville, Louisiana.*

a. *Letter from Mr. Guillot to the Wage and Hour Division.*

DUGAS & LEBLANC, LTD.
Manufacturers of
Westfield Sugars and Molasses

Paincourtville, La.
Sept. 29th, 1942

U. S. Department of Labor,
Wage and Hour Division,
Washington, D. C.

Gentlemen:

I am General Bookkeeper for the above firm, having been in their employment for the past twenty years. I am per-

fectly satisfied and fully desire to have my employer protected in every respect.

I would appreciate if you will assist me in giving me a definite ruling on the hour provision of the act with respect to our clerical force.

These people are Cane Farmers, Manufacturers of raw sugar and blackstrap molasses all moving to refineries within the state. Also a Narrow Gauge Railroad hauling our cane, and independent growers cane, but we bear the expense of the operation. They also operate in connection with their business, a retail store. The entire accounting record is kept and the work performed by the same office crew. Now, according to our interpretation of Bulletin No. 14, we arrive at this conclusion:

Farming-Agriculture	Exempt from hour provision
Processing Raw Sugar ..	Do.
Retail Store	Do.

Are we correct? Would the clerical help be also exempted?

My reasons for checking up on this and getting a specified ruling is that help is getting scarce, and it may be that we will have to put in longer hours, especially, during the harvesting and processing season.

Please advise promptly, and oblige,

Very truly yours,

/s/ PAUL E. GUILLOT

b. *Letter from Mr. William B. Grogan for the Administrator to Mr. Guillot.*

165 West 46th Street
New York, New York

SOL:JHS:DS

November 26, 1942

Mr. Paul E. Guillot
Dugas & LeBlanc, Ltd.
Paincourtville, Louisiana

Dear Mr. Guillot:

This will reply to your letter of September 29 relating to the application of the Fair Labor Standards Act of 1938 to the operations of a sugar mill in which you are general

bookkeeper. The original of your letter was sent directly to this Division; one copy was forwarded by Senator Allen J. Ellender of your State; and one copy was forwarded by Congressman James Domengeaux.

Both Senator Ellender and Congressman Domengeaux referred their copies of your letter to this Division for reply.

You state that your employers are cane farmers and manufacturers of raw sugar and blackstrap molasses, all moving to refineries within your State. They operate a narrow gauge railroad hauling both their own cane and the cane of independent growers. They also operate in connection with their business a retail store. The entire accounting record is kept by the same office crew. You conclude that the employees engaged in farming activities, processing of raw sugar and the retail store are exempt from the hour provisions of the Act. You ask if the clerical help would be exempt.

It appears that you already have a copy of Interpretative Bulletin No. 14. The first 13 paragraphs of that bulletin set forth the Administrator's interpretation of the scope of Section 13(a)(6) of the Act. However, the recent decision of the United States Circuit Court of Appeals in *Calaf* v. *Gonzalez*, 127 F. (2d) 934 (C. C. A. 1) indicates that the mere fact that owners of sugar cane farms are also owners of a sugar mill and transportation facilities does not make transportation of the cane from the farms to the mill "incident to farming" and therefore exempt under Section 13(a)(6). Therefore, your employees engaged in transporting cane from the fields to the mill are not exempt under section 13(a)(6) of the Act. Except for the qualification just referred to, I believe that the first 13 paragraphs of bulletin 14 will enable you to determine which of your employer's employees are engaged in "agriculture" and therefore within the scope of the section 13(a)(6) exemption, and thus exempt from both the minimum wage and overtime provisions of the Act.

Section 13(a)(2) of the Act contains an exemption from both its minimum wage and overtime provisions for: "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Your employer operates a retail store in connection with its business. An establishment will not qualify

for exemption under section 13(a)(2) unless more than 50 percent of its dollar volume of sales is in intrastate commerce. The exemption will also be defeated if its nonretail selling is substantial. For enforcement purposes, the Division will ordinarily consider the nonretail selling of an establishment to be substantial if the gross dollar volume of nonretail sales constitutes more than 25 percent of the gross receipts of the establishment. If this store meets the two tests above and is open to and frequented by the general public, it is probably a retail establishment within the meaning of section 13(a)(2) If so, employees solely employed in the retail store are exempt from the wage and hour provisions of the Act in any weeks in which they are employed solely in the retail establishment.

As to employees outside the scope of the two exemptions referred to above, consideration should be given to the application of the section 7(c) exemption. This section exempts from the overtime, but not minimum wage, requirements of the Act, employees processing sugar cane into sugar (but not refined sugar) in any place of employment where their employer is so engaged. In the ordinary case, the making of blackstrap molasses comes within the scope of this exemption. To be within the scope of this exemption, an employee must be employed in the establishment where operations exempt under this section are performed. Truck drivers who carry raw materials to the establishment, or who transport away from the establishment goods upon which exempt operations have been performed, may be considered as working in the "place of employment" within the meaning of this section.

You state that the accounting work related to all of your employer's operations are performed by the same office crew. Bookkeeping and other clerical employees may, in proper circumstances, be exempt under sections 13(a)(6), 13(a)(2) or 7(c). As to all your employees, the doing in a workweek of any work exempt only from the overtime provisions of the Act will require compliance with the minimum wage provision for all hours worked in the week. And the doing of any work exempt from neither the minimum wage nor overtime requirements will require compliance with both provisions for all hours worked in that week.

The minimum wage now applicable in the sugar industry is 30 cents an hour. However, the Administrator has re-

cently appointed an industry committee for the "Sugar and Related Products Industry." Under the provisions of the Fair Labor Standards Act, this industry committee may recommend to the Administrator for the sugar industry a minimum wage rate not to exceed 40 cents an hour. If such a recommendation for a rate in excess of 30 cents is approved by the Administrator, it will become effective on the date prescribed by him. If the Administrator approves such a wage order for the sugar industry, the usual public notice will be given in advance of its effective date.

If you have further questions, information may be obtained from our New Orleans, Louisiana office located at 916 Union Building in that city.

Very truly yours,

/s/ WILLIAM B. GROGAN
Acting for Administrator

L. METCALFE WALLING